

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1127

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT OF NEW YORK

JUL 29 1977

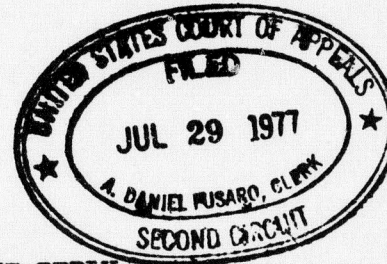
UNITED STATES OF AMERICA,

-against-

LEOLUCA GUARINO,

DEFENDANT-APPELLANT.

DOCKET No. 77-1127



DEFENDANT-APPELLANT'S PRO SE REPLY
BRIEF TO THE GOVERNMENT'S BRIEF IN
OPPOSITION.

Briefs-in-chief were timely submitted on June 9, 1977, and on July 16, 1977, the appellant herein received the Government's Brief in Opposition--ostensibly mailed timely, i.e., it was timely because the appellant's briefs were to be submitted no later than June 13, 1977. The brief received by the appellant was in the form of the proof reader's copy for printing. (Copy appended hereto). Subsequently, on or about July 21, 1977, the appellant received two copies of the final printed briefs that the Government submitted to this Court. The Government's printed briefs in opposition differ significantly from the proof reader's copy that was timely mailed to the appellant. Moreover, the appellant has received yet a third

set of briefs, on July 25, 1977, that also contains significant text alterations that differ from their first printed brief and substantially differ from the first one received by the appellant on July 16, 1977. The defendant is referring to changes that radically alters the argument of that contained in the printer's copy, and not merely of corrections. Consequently, the instant brief in reply is submitted pursuant to the Rules of Appellate Procedure, Rule 31(a), in an effort to remove some of the apparent confusion that the Government is attempting to generate. Argument will be geared towards the printer's copy as that is the only brief that appears to be timely. (See Rule 38, of this Court; Rule 31(c), Rules of Appellate Procedure; but see the appellant's Motion To Dismiss The Government's Brief(s) In Opposition As Untimely).

POINT I

THE GOVERNMENT CONCEDES THAT THE CONSPIRACY IN THE INDICTMENT PRESENTLY AT ISSUE IS THE SAME CONSPIRACY THAT WAS REVERSED BY THIS COURT, IN 1974, BECAUSE OF ILLEGAL WIRETAPPING.

In the printer's copy of the Government's brief in opposition the argument, under POINT I, makes the following concession:

"First, there was no reason to expect that the question of the validity of a new indictment would ever actually arise. (ftn. omitted). As is made clear in the nolle prosequi, prosecution is at present considered unwarranted because of the necessity of a separate trial without the wiretap evidence, because of the problem of increased sentence for the same conspiracy, and because Guarino is already serving a significant sentence for very similar crimes. These facts are not likely to change;..." (Id. at pp. 6-7).

The Government, of course, is referring to the conspiracy in Indictment No. 73 Cr. 460 which was reversed by this Court in United States V. Capra, 501 F.2d 267 (2nd Cir. 1974), because of illegal wiretapping. Notwithstanding, the Government saw fit to indict the appellant for the "same conspiracy" in 1976, completely disregarding the Southern District's Plan For Achieving Prompt Disposition Of Criminal Cases, Rule 6:

"Retrials.

Where a new trial has been ordered by the district court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order unless extended for good cause." (See also Rule 6, of this Court's Plan For Achieving Prompt Disposition Of Criminal Cases).

Obviously, the prevalent atmosphere existing in the U.S. Attorney's office, for the Southern District, is not only to disregard basic safeguards but, equally, it is one of apparent confusion. This is clearly manifested by the Government's allegedly "corrected copy" at page 13 where the continuity of their argument, from page 12, is lost by the insertion of matter to an appeal other than the appellant's. For example:

"Thus, viewing the acts and statements of Berenguer and Sansone in their entirety, the jury plainly could find that both were members of the same conspiracy.....

"In any event, the proof of Sansone's subsequent delivery of cocaine was neither a focal point of the Government's case nor inflammatory in the context of the overwhelming evidence of Berenguer's earlier participation in negotiations to sell sizable quantities of cocaine."

The appellant respectfully asks this Court how can the above quoted matter be deemed responsive to the appellant's claim of a denial of due process of law, when the Government failed to afford him a prompt and speedy trial--be it under the Speedy Trial Act of 1974 or the Plan for Achieving Prompt Disposition Of Criminal Cases, of this Court, or of the similar Plan of the Southern District? (See supra, p. 3).

POINT II

THE GOVERNMENT'S POSITION AS TO THE
TIME REQUIRED TO TRY THE APPELLANT,
TOGETHER WITH THE RECORD ON APPEAL,
SUPPORTS THE APPELLANT'S ARGUMENT
THAT HE WAS DENIED A PROMPT AND SPEEDY
TRIAL.

Assuming, arguendo, that the Government is correct and that it had 180 days in which to try the appellant rather than the 120 days claimed by the appellant (under the Speedy Trial Act of 1974) the relevant fact remains that the docket entry sheet clearly reflects that the Government's nolle prosequi was filed on December 28, 1976 (Appendix, p. 5; this entry occurring after the submission of the appellant's motion to correct the docket entries is not challenged by the appellant). Furthermore, the nolle prosequi itself carries a stamp of the clerk, which while blurred, can fairly be said to denote the date as that of December 28th. (Interestingly enough the third page of the nolle prosequi shows that two different dates were inked in. The first one is clear and reflects the 21st; the second one, however, is not so

clear and could be either the 24th or the 26th of December 1976). Hence, the Government's position that it had 180 days in which to try the appellant and that the 180th day expired on December 28, 1976, is not determinative of the issues at bar. This is so because by the Government's own admission it does not start to calculate the 180 days until after July 1, 1976, when in fact the 180 days limitation commences to run on July 1, 1976. Consequently, the record supports the fact that the nolle prosequi was filed on the 181st day, and not as the Government alleges on the 180th day. (See Cirillo V. United States, 554 F.2d 54, 55 (2nd Cir. 1977), as to the "presumption of regularity" attaching to court records, particularly docket entries; see also United States V. Ray, 183 F. Supp. 769 (DC Md. 1960)).

Concededly, the appellant did state in his brief-in-chief that the nolle prosequi was filed on December 21, 1976, but this is not dispositive of the actual date as it appears on the record presently before this Court. For in the final analysis the issue herein, inter alia, is whether the Government can seek a nolle prosequi after the defendant-appellant moved for a dismissal for lack of a speedy trial; and after granting the Government's nolle prosequi can the lower court deny the appellant's motion as moot without offending due process of law concepts.

The Government has attempted to becloud the crystal clear issues herein by arguing that it has the right to reindict in the future if it so chooses; that the appellant's argument is unripe

for decision; and that even if the appellant has an arguable issue he did move for a continuance which was granted via the severance, and that in any event the appellant had made many motions that were under consideration by the trial court which clearly fell within the excludable time period of 18 U.S.C., Sec. 3161(h). Only the latter merits comment.

The Government alludes to the many motions that were made by the appellant, written and orally, in which he sought various forms of relief, including continuances. (Government's Brief, pp. 4-5, and fn. thereto). However, what the Government fails to state is the fact that each and every time that the appellant appeared in court his motions for severance and continuances were individually denied from the bench in open court. The last such denial having occurred two or three days prior to severance on June 24, 1976. (Appendix, p. 7-A). Unfortunately, since the appellant's efforts to correct the docket entries (Appendix, p. 74) have proven fruitless--despite the fact that the Government conceded their inaccuracies (Appendix, p. 29)--the many denials for continuances are not reflected in the docket entries of appellant's Appendix. Had he been successful in his efforts the corrected docket sheet would accurately show the many denials for continuances that were entered by the trial judge in open court. In any event the record of these proceedings are readily accessible to the Government and in the interests of justice this Honorable Court should require the Government to produce them before rendering an

opinion. For although the appellant has filed the docketing fee he is unable to purchase the transcripts of his many court appearances due to indigency.

The Government next attempts to justify its untenable position by referring to the appellant's efforts to suppress the testimony of a Government witness, via motion, by claiming that the motion was under advisement and thus clearly justified any delay in trying the appellant (Government's Brief, p. 9, and ftn. thereto). Also, that "a number" of other "essential witnesses were unavailable for trial of Guarino during and because of the trial of the unsevered defendants." (Ibid). Significantly, the only witness against the appellant was Jack Brown, the witness against whom the above mentioned motion was directed to. Again, it is important to note that this motion, that was supposedly "under advisement", is not reflected in the docket entries. And that while the Government did deem it expedient to attach a complete and accurate docket entry to a different indictment (73 Cr. 460), that has absolutely no relevance to the case at bar--other than perhaps the "same conspiracy" count, it has failed to submit a transcript in support of its position that the motion was indeed "under advisement". Consequently, the Government submits as gospel what they cannot support with documentary evidence.

Similarly, the Government alleges that "(a)t a pre-trial conference held on December 8, 1976 before Judge Broderick, however,

the Government advised the Court that it did not intend to proceed to trial against Guarino, or his co-defendants Capra and Dellacava. Although the Government suggested that its decision not go (sic) forward rendered Guarino's outstanding claims moot, the Court requested the Government to file a brief memorandum of law dealing with the merits of Guarino's motions. The Government filed its memorandum of law along with an affidavit and proposed order of nolle prosequi shortly thereafter." (Government's Brief, p. 5). Here, also, we have no prove in the docket entries of any "pre-trial conference" that was held on "December 8, 1976". Instead we have the Government's naked assertion that indeed one was held. If such a conference was held on "December 8, 1976" then surely a transcript must exist?

It should be noted that the above quoted material reflects the district judge's (the third judge to sit in the appellant's case) genuine concern for the appellant's rights. A concern that the Government file a memorandum "dealing with the merits of Guarino's motions." (Emphasis added). Obviously, this concern was one sided because the Government's memorandum failed to deal with the "merits" of appellant's many "motions". Instead, the Government referred tot hem in a vague and ambiguous manner, cavalierly declining to deal "with the merits". (Appendix, p. 29, et seq.).

Be that as it may, the fact remains that the docket entry presently before this Court does reflect (under an undistinguishable date) that a "(p)re Trial conference (was) Held as to dft. Guarino, etc." and that a "Trial (date was set for) Jan. 10, 1977 & confer-

ence adj. to Dec. 14, 1976 @4:30 P.M....Broderick, J." (Appellant's Appendix, p. 4). It is safe to assume that this conference was held on December 8, 1976. And the fact that the Government obtained a second writ of habeas corpus ad prosequendum, on the day before, i.e., December 7, 1976 (Appellant's Appendix, p. 18) flies in the face of their newly adopted position that at the alleged pre-trial conference, of December 8, 1976, "the Government advised the Court that it did not intend to proceed to trial against Guarino,..."

Parenthetically, on December 9, 1976, the appellant was removed from the Atlanta Penitentiary pursuant to the above mentioned second writ for purposes of trial--one day after the Government alleges that it had informed the Court that it had no intention of prosecuting the appellant.

POINT III

THE APPELLANT IS NOT INVOKING ANY CLAIM UNDER THE PROVISIONS OF THE INTERSTATE AGREEMENT ON DETAINERS ACT.

- i. The Appellant Has Consistently Sought The Equal
Application Of The Mauro Principles That Equate
A Writ Of Habeas Ad Prosequendum With A Detainer.

A perusal of the record on appeal as well as of the brief-in-chief clearly shows to the casual reader that at no time has the appellant sought dismissal of the indictment with prejudice on the basis, per se, of the Interstate Agreement on Detainers Act. (Hereinafter, The Act). Notwithstanding, the Government insists

that the appellant is indeed attempting to invoke the provisions of The Act. (Government's Brief, p. 12).

The Government further attempts to justify its failure to try the appellant, when he was removed via the first writ of habeas corpus ad prosequendum, (Appendix, p. 6), by implying that the appellant was "transferred" from one federal facility to another. (Government's Brief, pp. 13-14, and fn. thereto).

It is respectfully submitted to this Court that when a federal prisoner is "transferred" from one federal facility to another it is solely for purposes of confinement under the statutory support of 18 U.S.C., Sec. 4082(b):

"The Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise, and whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another." (Emphasis added).

And that when such a transfer occurs no writ of habeas corpus is necessary--particularly an ad prosequendum writ.

Here we have the distinction of a writ of habeas corpus ad prosequendum been issued, and signed by a judge, for the sole purpose of the removal of the appellant from the Atlanta Penitentiary for purposes of facing a new indictment--and not for purposes of transfer and confinement upon the sentence that the appellant was then serving. Thus, the Government's position that the appellant

can be transferred from one federal facility to another without infringing basic rights, while sound in principle, is inapplicable to the fact pattern of the case at bar.

The appellant premised his claim of a due process violation on this Court's holding that:

"....the writ of habeas corpus ad prosequendum is a detainer entitling the state inmate to the protection provided in Article IV and specifically to a trial before his return to the State institution." (United States V. Mauro, 544 F.2d 588, 592: emphasis added).

- ii. Failure To Try The Appellant Before Returning Him To Atlanta Penitentiary, And The Issuance Of The Second Writ, Has Disrupted His Rehabilitative Program And Caused Him Irreparable Harm.

The appellant respectfully submits to this Court that when Judge Frankel granted his motion for a reduction of sentence in indictment 73 C. 460, pursuant to Rule 35, Federal Rules of Criminal Procedure, the Appellant's sentence was reduce to 14 years with the following proviso:

"The court orders commitment to the custody of the Atty. General and recommends, as in the case of co-deft. John Capra, that application for transfer to Lewisburg, if one is made, be given favorable consideration if possible..." (Government's Appendix, p. 13).

Co-defendant, John Capra, had been resentedenced as follows:

"The court orders commitment to the custody of the Atty. General and recommends, that the Bureau of Prisons consider favorably if possible the application for deft's transfer to Lewisburg where family visits, with their rehabilitative potential, would be more feasible...." (Ibid, emphasis added).

Based on the above it is fair to conclude that Judge Frankel did not deem the appellant to be beyond the scope of rehabilitation. To this end the appellant undertook corrective steps to capitalize on whatever "rehabilitative potential" was available to him. Being a veteran, with a penchant for creative writing, advantage was taken of the veteran's benefits program by enrolling in one of the college courses available in the Atlanta Penitentiary. It was during the course of attending college that the Government indicted the appellant and issued its first writ of habeas corpus ad prosequendum which, obviously, compelled the appellant to drop out of the college program.

It should be judicially noted that upon the appellant's return to Atlanta he initiated efforts to resume his college program but was told that because of the outstanding indictment, and the likely prospect that he would again be taken out of Atlanta to be tried and thus again disrupt his college program, it would not be possible, nor feasible, to allow him to resume his studies.

After the granting of the Government's nolle pross the appellant again sought admission into the college program but was unable to obtain admittance because the nolle prosequi is viewed as a vehicle that may again disrupt the appellant's college attendance. Additionally, the nolle pross is something that will be considered adversely to the appellant when he appears before the Parole Commission. (See e.g., Lupo V. Norton, 371 F.Supp. 156 (USDC Conn. 1974); and Manos V. U.S. Board of Parole, 399 F.Supp.

1103 (USDC N.Pa. 1975)).

In this context, the reasoning used in United States V. Ford, 550 F.2d 732 (2nd Cir. 1977), is particularly relevant because, and notwithstanding the Government's position, there had been an irreparable disruption of the appellant's rehabilitative efforts and he continues to be prejudiced by the existence of the nolle prosequi.

CONCLUSION

The Order appealed from should be reversed and the district court should be ordered to dismiss the instant indictment with prejudice.

Respectfully submitted,

Leoluca Guarino

Leoluca Guarino #78281
Defendant-Appellant, pro se
PO Box FMB
Atlanta, Georgia 30315

CERTIFICATE OF SERVICE
BY MAIL

STATE OF GEORGIA)

COUNTY OF FULTON)

SS:

LEOLUCA GUARINO, after being duly by law sworn, deposes and says: that on this 27th day of July, 1977, he mailed a copy of the instant Reply Brief, together with the Supplemental Appendix, to the United States Attorney's Office for the Southern District of New York. All of which should constitute sufficient proof of service.

Yours etc.,

Leoluca Guarino

Leoluca Guarino #78281
Defendant-Appellant, pro se

Sworn to before me this

27th day of July, 1977.

Charles E. Moore

Parole Officer: Authorized by the Act of
July 7, 1955 to Administer Oaths (18 USC
4004). -4

SUPPLEMENTAL APPENDIX

77-1127

To be argued by
DAVID C. PATTERSON

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1127

UNITED STATES OF AMERICA,
Appellee;

—v.—

LEOLUCA GUARINO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1127

UNITED STATES OF AMERICA,

Appellee,

—V.—

LEOLUCA GUARINO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Leoluca Guarino appeals from an order entered on December 28, 1976, in the United States District Court for the Southern District of New York, by the Honorable Vincent L. Broderick, United States District Judge, denying, as moot, Guarino's motion to dismiss with prejudice Indictment 76 Cr. 324 charging him with violations of the federal narcotics laws.

Indictment 76 Cr. 324, filed in forty counts on April 5, 1976 and unsealed on April 21, 1976, charged Guarino and thirty-two others with a conspiracy to violate the narcotics laws from January 1, 1968 to the filing of the indictment, in violation of Title 21, United States Code, Sections 173, 174 and 846. Guarino was also charged in Counts Thirteen and Fourteen with distributing three and one-half kilograms of heroin in violation of Title 21,

United States Code, Section 841(a)(1)(A). (App. 1; G. App. 15-26, 31).*

On June 24, 1976, pursuant to his own motion and over Government objection, Guarino was severed from the main trial of the defendants on Indictment 76 Cr. 324, which commenced on August 10, 1976 before the Hon. Richard Owen, United States District Judge, and a jury.** On December 2, 1976, Guarino moved, *pro se*, to dismiss the indictment, insofar as it related to him, with prejudice, claiming he had been denied his right to a speedy trial and that the Government had violated provisions of the Interstate Detainer Act, Title 18, United States Code, App. 1, which Guarino, a federal prisoner, claim applied to him. On December 14, 1976 the Government advised the District Judge that it would file a *nolle prosequi* with respect to Guarino and two co-defendants and an order to that effect was entered by the Hon. Vincent L. Broderick, United States District Judge, on December 28, 1976. On the same day, Judge Broderick denied Guarino's motion to dismiss the indictment with prejudice, on the ground that the motion was moot. The Court further noted that it had

* References prefixed "App." are to the defendant-appellant's appendix. References prefixed "G. App." are to the Government's appendix. References prefixed "Tr." are to the transcript of the trial of the unsevered defendants.

** Twenty-two defendants went to trial on a redacted thirty-count indictment. On November 12, 1976 the jury returned verdicts of guilty as to seventeen defendants, not guilty as to four defendants, and failed to reach a verdict as to one defendant. The convictions of fourteen defendants are presently on appeal in Docket Nos. 77-1085-1094, argued before a panel of this Court on June 8, 1977.

✓ Trial of the remaining defendants on the indictment was reassigned from Judge Owen to Judge Broderick after the conclusion of the first trial.

... "carefully considered the substantive representations contained in the Government's nolle prosequi and has satisfied itself that the nolle prosequi is not being used to circumvent the time requirement of the Speedy Trial Act, 18 U.S.C. Section 3161, *et seq.*"

(App. 20).

From this order, Guarino now appeals.

Statement of Facts

Indictment 76 Cr. 324 charged the existence of a far-flung narcotics conspiracy of at least seven years duration whose members were responsible for the distribution of enormous amounts of heroin and cocaine principally in New York, Washington, Miami, and Chicago. Leoluca Guarino and co-defendants John Capra and Steven DellaCava were named in the indictment as suppliers of heroin to the conspiracy.

At the time the indictment was filed, Guarino was incarcerated in the Atlanta penitentiary, serving a sentence of fourteen years' imprisonment on a 1973 federal narcotics conviction.* On April 22, 1976, one day after

* On May 16, 1973, in the Southern District of New York, Guarino and several other defendants including John Capra and Stephen DellaCava were charged in Indictment S.73 Cr. 460 with a narcotics conspiracy and four substantive narcotics offenses. After a jury trial before the Honorable Marvin E. Frankel, United States District Judge, the defendants were convicted on all counts. Guarino and Capra each received concurrent sentences of fifteen years on the conspiracy count and on each of three substantive counts, along with a three year consecutive sentence on the fourth substantive count and a six year special parole term. DellaCava received concurrent sentences of fifteen

[Footnote continued on following page]

(2) the instant indictment was unsealed, the Honorable Charles L. Brieant, Jr., United States District Judge, issued a writ of habeas corpus *ad prosequendum* directing that Guarino be brought from the Federal Penitentiary in Atlanta, Georgia, to the United States District Court for the Southern District of New York to plead to the charges contained in Indictment 76 Cr. 324. (App. 1, 6.) Guarino appeared on that date and a plea of not guilty was entered. He remained thereafter in the Metropolitan Correction Center, New York, New York (hereinafter "M.C.C."). (App. 1). Thereafter, on May 7, 1976, with all defendants present, a trial date of July 19th for all defendants was fixed in open court by the Honorable Richard Owen, United States District Judge. (G. App. 41-44.)

On May 13, 1976, Guarino moved jointly with Capra and DellaCava for "a continuation and adjournment of the trial date from July 19, 1976 to the Fall of 1976," for a severance of their trial from that of their thirty co-defendants, and for an extension of time in which to make further motions. This joint motion of May 13, 1976, filed *pro se*, referred to several claims based on the movants' 1973 convictions. It stated their belief that the conspiracy for which they had been convicted in 1973 was the same as the conspiracy with which they were charged in the 1976 indictment, and also their belief that the Government would again attempt to introduce evidence derived from the electronic surveillance that had been ruled illegal in 1973. (G. App. 45-50).

years on all counts, plus a special parole term of six years. On appeal, the substantive convictions of all three were affirmed; however, their conspiracy convictions were reversed as resting on evidence obtained from an unlawful electronic surveillance. *United States v. Capra*, 501 F.2d 167 (2d Cir. 1974). Subsequently, Guarino's sentence was reduced to fourteen years' imprisonment. (G. App. 7-9, 13). At all times relevant to this appeal Guarino has been in federal custody serving the above sentences.

On June 4, 1976, at the argument of the defendants' various motions, Guarino again urged upon the trial judge that he be granted a severance. Three days later, on June 7, Guarino filed a number of further motions, including a renewed motion for severance, a formal motion to dismiss on the grounds of double jeopardy and a formal motion to exclude illegal wiretap evidence. (G. App. 51-63).^{*} Thereafter, on June 24, 1977, Judge Owen granted the severance motions of Guarino, Capra, and Dellacava. (App. 7-A). Guarino remained in the M.C.C. until September 7, 1976 when he was returned to the Atlanta Penitentiary. (App. 3, 6-7).

On December 2, 1976, three weeks after the conclusion of the fourteen week trial before Judge Owen, Guarino moved to dismiss Indictment 76 Cr. 324 with prejudice, insofar as it related to him, on the grounds (1) that he had been denied his right to a speedy trial and (2) that he had been improperly returned to the Atlanta Penitentiary without first being tried in the Southern District. (App. 9-17). At a pre-trial conference held on December 8, 1976 before Judge Broderick, however, the Government advised the Court that it did not intend to proceed to trial against Guarino, or his co-defendants Capra and Dellacava. Although the Government suggested that its decision not go forward rendered Guarino's outstanding claims moot, the Court requested the Government to file a brief memorandum of law dealing with the merits of Guarino's motions. The Government filed its memorandum of law along with an affidavit and proposed order of *nolle prosequi* shortly thereafter. Finally, on December

^{*} In addition to those mentioned in text, Guarino made a large number of other motions during the period between his indictment and December 28, 1977. These motions are catalogued in Guarino's Motion to Correct Docket Entries dated December 10, 1976. (G. App. 64-68.)

The only conceivably "live" aspect of his motion was his request for protection from a new indictment. However, the request, if it was not technically moot, was at least ripe for decision.

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28, 1976, the district judge denied Guarino's various motions and entered an order of *nolle prosequi* on Indictment 76 Cr. 324 with respect to Guarino, Capra, and Dell'ava. (App. 5).

ARGUMENT

POINT I

The District Court Properly Denied Guarino's Motion As Moot.

In seeking to have Indictment 76 Cr. 324 dismissed with prejudice Guarino in effect sought two things: the setting aside of that particular indictment, and a judicial ruling that the Government was barred from ever securing a new indictment for the same crimes. As to the first of these two elements of relief, Guarino's motion was clearly moot. Through the *nolle prosequi*, the Government had irrevocably abandoned indictment 76 Cr. 324. Insofar as Guarino sought protection from that indictment, he already had complete relief.*

First, there was no reason to expect that the question of the validity of a new indictment would ever actually arise.** As is made clear in the *nolle prosequi*, prosecu-

* Guarino's suggestion that his motion should have been decided because it was "capable of repetition yet evading review" is frivolous. If he is reindicted he can in the normal course challenge the indictment, and it will in no way "evade review."

** In effect Guarino seeks the equivalent of a declaratory judgment that any future indictment of him for the same crimes would be barred. See *White v. United States*, 377 F.2d 948, 949 (D.C. Cir. 1967) ("dismissal with prejudice constituted an adjudication which barred another prosecution for the same offense"). Numerous cases in which the courts have refused

[Footnote continued on following page]

tion is at present considered unwarranted because of the necessity of a separate trial without the wiretap evidence, because of the problem of increased sentence for the same conspiracy, and because Guarino is already serving a significant sentence for very similar crimes. These facts are not likely to change; neither, barring the speculative possibility of new developments in this case, is the Government's decision not to prosecute.

A second strong reason to regard the question of whether the Government may reindict as unripe for decision is that if the question ever does arise, it will be upon facts quite different from those now presented.* There will, for example, have been a further period of delay, possibly giving rise to new speedy trial claims, or to a claim of a due process violation under *United States v. Marion*, 404 U.S. 307 (1972). The Government will also be able to present reasons, should they be necessary, to explain why the charges were first dismissed and then revived.

Because it may never actually arise, and, if it does, will arise in substantially different form, the question of whether the Government may reindict Guarino is classically unripe for judicial decision. The District Judge's

declaratory relief because the actual controversy between the parties was excessively remote or hypothetical are collected in 10 C. Wright & A. Miller, *Federal Practice & Procedure* 760 (1973). See also 3 K. Davis, *Administrative Law Treatise* 116 (1958) ("The basic principle of ripeness is easy to state: Judicial machinery should be conserved for problems which are real and present or imminent, not wasted on problems which are abstract or hypothetical or remote.").

* The "fitness of the issues for judicial decision" is one of the principal factors to be considered when judging whether a question is ripe, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), and clearly the issues are not fit for decision if the ultimate facts are not known. See also 3 K. Davis, *Administrative Law Treatise* § 21.02 (1958).

refusal to address the question, although couched in terms of its "mootness," was entirely proper.*

POINT II

Even If Guarino's Motion Was Not Moot, It Was Properly Denied On The Merits.

Guarino now raises two claims on the merits why his indictment should have been dismissed with prejudice. Even assuming that one were to reach these issues, they are meritless.

A. Guarino Was Not Entitled To Dismissal With Prejudice On Speedy Trial Grounds.

For his speedy trial claim Guarino relies on the Speedy Trial Act of 1974, and in particular its requirement that trial proceed within a certain number of days after arraignment on an indictment. 18 U.S.C. § 3161(c). Guarino's brief states that the applicable time period in

* It is true that the courts often grant dismissals with prejudice, of excessive delay, e.g., *Strunk v. United States*, 412 U.S. 434 (1972) (Sixth Amendment violation); *United States v. Furey*, 514 F.2d 1098 (1975) (violation of district prompt disposition plan), and that the Speedy Trial Act contemplates such dismissal in some cases. 18 U.S.C. § 3162. However, the present case is distinguished in at least two ways from the normal class of cases in which dismissals with prejudice have been granted. First, the Government as well as the defendant sought dismissal here making the possibility of reindictment particularly remote. Second, whereas a very strong claim of speedy trial violation might merit a final adjudication in the form of a determination with prejudice and such a strong claim is often present where, for example, the Speedy Trial Act has actually been violated, Guarino's claim in this case is extremely weak, if not entirely frivolous. See Point II (A), *infra*.

AP 11

his case was one hundred and twenty days from July 1, 1976, Brief for Appellant at 13, but he has misread the statute. The time within which to try did indeed run from July 1, 1976, the date of Section 3161(c)'s effectiveness, arraignment having taken place before that date. See 18 U.S.C. § 3163(b). However, since the twelve-calendar-month period following July 1, 1976 was the *first* such period, and not the *second*, as Guarino's brief states, the applicable time period was one hundred and *eighty* days, not one hundred and *twenty*. See 18 U.S.C. § 3161(g), Rule 5(a)(1), Plan for the Prompt Disposition of Criminal Cases, Southern District of New York. Even without any tolling of the statute under 18 U.S.C. § 3161(h), therefore, the time within which to try Guarino under the Speedy Trial Act would not have expired until December 28, 1976, the one hundred and eightieth day after July 1, 1976.

In fact the record makes clear that substantial amounts of time following July 1, 1976, were properly excludible under 18 U.S.C. § 3161(h) from the time within which Guarino was required to be tried as provided by Rule 10(a) of the local rules. To cite only the clearest example, on December 2, he filed the dismissal motion whose denial is the object of this appeal. That motion was under advisement between its filing and the dismissal of the indictment on December 28, 1976, and this period was therefore clearly excludible under 18 U.S.C. § 3161(h)(1)(G).*

* Numerous other motions by Guarino were also under advisement from the dates of their filings through the date of the indictment's dismissal. See Statement of Facts, *supra*.

Moreover, a number of essential witnesses were unavailable for trial of Guarino during and because of the trial of the unsevered defendants. For example, the Government's principal witness in the case, Jack Brown, whose essentials to the trial of Guarino is best demonstrated by Guarino's own extraordinary

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In any case, it is not necessary to find any tolled period prior to December 28, 1976. On that day the Government could still have tried Guarino, or, perhaps more realistically, obtained a continuance under 18 U.S.C. § 3161(h) (8) (A). It is sufficient for present purposes that as of the date his motion was denied, Guarino had no claim to dismissal under the Speedy Trial Act no matter how favorably it might be applied to him.*

efforts to suppress Brown's testimony, see Guarino's motions of October 6, 1976, (G. App. 69-85), was on the witness stand continuously from August 20, 1976, to September 8, 1976, in the principal trial of the ~~named~~ defendants (Tr. 987-3109), and was for that reason clearly unavailable as against Guarino within the meaning of 18 U.S.C. § 3161(h) (8).

Finally, in response to Guarino's own severance motions, joined on May 13, 1976, with an explicit motion for continuance of the trial, Judge Owen ruled on June 24, 1976, that Guarino should be served "for later trial." (App. 7-A). Clearly this constituted the granting of a continuance pending the main trial pursuant to § 3161(h) (8) (A). Even if it did not meet the technical requirements of that section, it makes clear that the understanding of all concerned was that Guarino's trial was being continued at his own request until after the main trial, which consumed fourteen weeks and could not conceivably be conducted simultaneously.

* Guarino objects that the Government sought dismissal "in an effort to save their case for future prosecution." Brief at 18. First, the statute does not prohibit the Government from doing so. As is clearly implied by subsection § 3161(h) (6), the Government is free to dismiss and reinstitute a charge, with time running against it under the statute only when a charge is actually pending. *United States v. Sebastian*, 428 F. Supp. 967, 973 (W.D.N.Y. 1977); See also *United States v. Flores*, 501 F.2d 1356, 1359-60 (2d Cir. 1974). Second, even if some exception were to be made when the Government dismisses and re-indicts for the sole purpose of evading the statutory time limits, the District Court explicitly found that this is not such a case. No doubt having been cast on the reasons given for the ~~rolls~~ *prosequi*, the District Court's finding was not clearly erroneous.

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Moreover, even if the time within which to try Guarino had technically run on December 28, entitling him to a dismissal, he plainly was not entitled to a dismissal *with prejudice*. When granting a dismissal for failure to comply with § 3161(c), the District Court is required to determine whether the dismissal should be with prejudice on the basis of several factors: the seriousness of the offense, the facts and circumstances leading to the dismissal, and the impact of reprosecution on the administration of the Speedy Trial Act and the administration of Justice. 18 U.S.C. § 3162(a)(2).^{*} The indisputable facts of record in this case are that Guarino's alleged offense was ~~extremely~~ serious, that the delay in his trial was the inevitable result of his own severance motion, and that the time period for trial had only expired on the exact day of the dismissal. Given these facts, it would have been a clear abuse of the District Judge's discretion to grant a dismissal with prejudice, even assuming, contrary to fact, that a technical violation of § 3161(c) had occurred.

As noted above, the Speedy Trial Act of 1974 is the only speedy trial provision referred to in Guarino's brief on appeal. However, his dismissal motion in the District Court referred broadly to an alleged denial of a "prompt and speedy trial" (App. 9), and the accompanying memorandum of law referred to the rule of this Circuit that the Government must be ready for trial within six months of indictment. (App. 16). Construing his papers liberally, and assuming that the various applicable speedy trial provisions other than the Speedy Trial Act of 1974 have been properly asserted in the District Court and here, it is clear that none of these provisions has been violated.

^{*} Indeed, Rule 11(e) of the local rules appears to permit District Courts to dismiss with prejudice only order limited circumstances not applicable here, and under Rule 48(b) of the Federal Rules of Criminal Procedure for "unnecessary delay."

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ti A claim of a speedy trial violation under the Sixth Amendment or the coterminous constraints of Rule 48(b) of the Federal Rules of Criminal Procedure would plainly be frivolous. See *United States v. Mejias*, 552 F.2d 435, 442-43 (2d Cir. 1977) (delay of twenty-one months "not extraordinary" and therefore no Sixth Amendment or Rule 48(b) violation), and cases cited.

Rule 7 of the Southern District Plan for Prompt Disposition of Criminal Cases, promulgated pursuant to 18 U.S.C. § 3164, requires the Government to be ready for trial within six months of the filing of an indictment, but this requirement was clearly met in this case. As noted above, at a pretrial conference held on May 7, 1976, the date of July 19, 1976, was initially set for trial of this case. In acceding to this date, which was well within the Rule 7 six month period, the Government made clear its readiness to proceed on July 19 with the trial of all unsevered defendants, which as of May 7 still included Guarino.

B. Guarino was not entitled to dismissal with prejudice on the basis of the Interstate Agreement on Detainers

Guarino claims that his return from the Metropolitan Correctional Center in New York City to the Atlanta Penitentiary following his arraignment in the Southern District on indictment 76 Cr. 324, but before any disposition of the case, entitles him to have the indictment dismissed. His theory is that if he were so returned to the custody of a state, he would be entitled to dismissal with prejudice under the Interstate Agreement on Detainers (hereinafter "I.A.D.") as interpreted in *United States v. Maurer*, 544 F.2d 588 (1976), and *United States v. Forks*, 550 F.2d 732 (1977). Under Equal Protection principles as applied to the Federal Government in *Bolling*

v. *Sharpe*, 347 U.S. 497 (1954), Guarino argues, he can be entitled to no less as a *federal* prisoner.

It is clear of course that the Interstate Agreement on Detainers does not itself apply, Guarino never having been transferred from the custody of one "state" to another. The suggestion that the Federal Government, in entering the Agreement, became bound by a parallel set of restraints with respect to its own prisoners, is frivolous.*

Assuming that, as Guarino alleges, the Federal Government treats state and federal prisoners differently in some significant respect, all that is required to satisfy Equal Protection principles is that the difference of treatment have a rational basis.** The rational basis for

* Followed logically, Guarino's reasoning would have at least two startling results. First, it would appear to imply that no state could constitutionally decline to join the IAD, since surely if the federal government treated the prisoners of a joining state differently than those of a non-joining state the equal protection question is virtually identical to that raised by Guarino. Similarly, Guarino's logic would seem to imply that all intra-state transfers must be governed by the IAD: since the Equal Protection clause applies directly to the states, a requirement that intra-jurisdictional transfers must be given equal coverage as inter-jurisdictional ones would necessarily require all states to provide their prisoners with its benefits.

The easy answer to these problems as well as the present one, of course, is that the framers of the IAD decided not to give the IAD such coverage. Furthermore, as the Supreme Court has noted "more than once," "legislative reform by way of classification is not to be invalidated [under the Equal Protection clause] merely because the legislature moves one step at a time." *Schill v. Kuebel*, 404 U.S. 357, 364 (1971).

** See, e.g., *Richardson v. Belcher*, 404 U.S. 78, 81-84 (1971); *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955). A stricter standard of

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transferring federal prisoners between federal facilities, more freely than state prisoners may be transferred between state and federal facilities, is simply that the reasons for minimizing state-federal transfers do not apply with the same force to intra-federal transfers.

The IAD's requirement that the charges on which a prisoner is transferred from one "state" to another be disposed of before his return insures that a "state" will have to give up custody of its prisoner, and interrupt his rehabilitation, only once for each set of such charges. To the extent that this provision is a comity provision, aimed at minimizing one jurisdiction's interference with another, its policy obviously has no application at all to intra-federal transfers.

Another, and perhaps stronger policy of the "one transfer only" provision is the protection of the prisoner. Article I of the IAD states that its purpose is to promote "expeditious and orderly disposition" of the charges on the basis of which detainers are filed, and thus to reduce "uncertainties which obstruct programs of prisoner treat-

review would apply only if the difference of treatment involved a gender-based distinction (obviously, inapplicable), a "suspect classification," or a "fundamental interest." See *Craig v. Boren*, 429 U.S. 190, 210 (1976); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). But no reason has been suggested why the distinction between federal and state prisoners should be regarded as "suspect," and the interest in having an indictment disposed of before retransfer is clearly not "fundamental." See *McEachum v. Fazo*, 427 U.S. 215 (1976) (transfer from one prison to another does not infringe "liberty" interest so as to trigger Procedural Due Process).

* This Court has recognized that minimizing the protection of the interests of "sending states" was one of the purposes of the Agreement. See *United States v. Ford*, 550 F.2d 732, 740 (2d Cir. 1977). The Agreement itself contains evidence of this purpose; an example is Article V, Section (h), which apportions the costs of a temporary custody to the "receiving state."

ment and rehabilitation." As this Court has recognized, the requirement of final disposition during the first transfer "is intended to avoid disruptions in a prisoner's rehabilitation occasioned by repeated transfers between jurisdictions." *United States v. Ford*, 550 F.2d 732, 742 (2d Cir. 1977). A related problem, expressly referred to in the Agreement, is that of the prisoner's possible loss of good time when he leaves the custody of the "sending state." See Article V, Section (f).

Clearly the prisoner who is merely transferred between federal facilities is not harmed in these ways to the same extent, if at all. Transfer within the federal penal system can be expected to produce much less disruption in "programs of prisoner treatment and rehabilitation," and there is no problem at all with the loss of good time.*

The obvious and fundamental differences between state-federal and intra-federal transfers make a difference of treatment of the two entirely rational, and deprive Guarino's Equal Protection theory of any plausibility.

* Both in the passage from *United States v. Ford* quoted in the preceding paragraph, and in the following passage from *United States v. Mauro*, 544 F.2d 583 (2d Cir. 1976), this Court has referred to the "one transfer only" provision in terms of the problems that arise from *inter-jurisdictional* transfers:

"In view of the clear language of Article IV(e), we believe the Agreement was plainly designed to avoid the shuttling of prisoners back and forth between the penal institutions of two jurisdictions."

544 F.2d at 593 (emphasis added).

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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